No._____

In the Supreme Court of the United States

JAVIER MARTINEZ, PETITIONER,

V.

LOWELL CLARK, WARDEN, NORTHWEST ICE PROCESSING CENTER; NATHALIE ASHER, FIELD OFFICE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; ALEJANDRO MAYORKAS, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; MERRICK B. GARLAND, U.S. ATTORNEY GENERAL, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether an agency's determination that undisputed or established facts demonstrate an immigration detainee is a "danger to the community" is a discretionary determination barred from judicial review under 8 U.S.C. § 1226(e), or whether such a determination constitutes a mixed question of law and fact subject to judicial review in accordance with *Guerrero-Lasprilla v. Barr*, 589 U.S. ---, 140 S. Ct. 1062 (2020)?

(2) Whether 8 U.S.C. § 1226(e), which bars federal courts from reviewing discretionary judgments or setting aside custody determinations made by the Attorney General under § 1226, is applicable when the district court held § 1226 unconstitutional as applied and ordered a bond hearing pursuant to the Fifth Amendment's Due Process Clause?

LIST OF PARTIES

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows: Petitioner is Javier Martinez; and Respondents are Lowell Clark, in his official capacity as warden of the Northwest ICE Processing Center; Nathalie Asher, in her official capacity as the Director for the Tacoma Field Office of U.S. Immigration and Customs Enforcement; Alejandro Mayorkas, in his official capacity as Secretary for the Department of Homeland Security; and Merrick B. Garland, in his official capacity as Attorney General of the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED CASES

Martinez v. Clark, et al., No. 20-cv-780, U.S. District Court for the Western District of Washington. Judgment entered December 14, 2020.

Martinez v. Clark, et al., No. 21-35023, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 15, 2022.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Javier Martinez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 36 F.4th 1219 and reprinted at Petition for Writ of Certiorari Appendix at App. 1–23. The panel order denying review en banc and the eleven-judge statement respecting the denial of en banc review is reported at 68 F. 4th 1195 and reprinted at App. 44–61. The decision of the district court denying Mr. Martinez's petition for a writ of habeas corpus seeking to enforce a prior habeas order is unreported and reprinted at App. 24–27. The report and recommendation the district court adopted is unreported and reprinted at App. 28–43. The district court's original order granting Mr. Martinez's petition for a writ of habeas corpus is unreported and reprinted at App. 71–73. The report and recommendation the district court adopted in the original proceeding is unreported and reprinted at App. 74–100. The decision of the Board of Immigration Appeals (BIA) dismissing Petitioner's administrative appeal is unreported and reprinted at App. 62–64. The decision of the Immigration Judge (IJ) denying Petitioner's request for custody redetermination is unreported and reprinted at App. 65–70.

JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1). The date on which the Ninth Circuit Court of Appeals decided this case was June 15,

2022. A timely petition for rehearing was denied by the Ninth Circuit on May 30, 2023, and a copy of the order denying rehearing appears at App. 44–61. The mandate issued on June 7, 2023. This Court granted an extension of time within which to file the petition for a writ of certiorari up to and including September 27, 2023, on August 17, 2023, in Application No. 23A143.

STATUTORY PROVISIONS INVOLVED

Section 1226 of Title 8 of the United States Code provides in relevant part:

> (a) Arrest, detention, and release
>
> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General—
>
> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
>
> (B) conditional parole . . . .
>
> * * *
>
> (c) Detention of criminal aliens
>
> (1) Custody. The Attorney General shall take into custody any alien who—
>
> . . .

> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> . . .
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> * * *
>
> (e) Judicial review
>
> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

INTRODUCTION

This case concerns important questions regarding a federal court's jurisdiction to review mixed questions of law and fact in immigration custody hearings. The first of these questions will be directly impacted by this Court's pending decision in *Wilkinson v. Garland*, No. 22-666 (cert. granted June 30, 2023). Accordingly, Mr. Martinez requests that this petition for certiorari be held in abeyance pending this Court's resolution of *Wilkinson*.

At issue in this case is whether the federal courts have authority to review an IJ's dangerousness determination that rendered Petitioner ineligible for release under bond. The panel concluded that pursuant to 8 U.S.C. § 1226(e), a federal court

lacks that authority as such a "subjective and value-laden" finding, App. 17, is "purely discretionary" and therefore beyond the district court's review. App. 18.

After Mr. Martinez filed a petition for rehearing en banc, eleven judges issued a statement regarding their disagreement with the court of appeals' refusal to reconsider the panel opinion en banc, declaring that "[t]he panel's characterization of the dangerousness determination as discretionary conflicts with longstanding precedents from the criminal bail context that dangerous determinations are mixed questions of law and fact, subject to independent review. And the panel's ruling is at odds with Supreme Court guidance as to the sorts of determinations that constitute mixed questions rather than discretionary ones." App. 47 (citations omitted).

The first question presented here—whether a determination as to "danger to the community" raises a mixed question of law and fact that is reviewable—implicates this Court's pending decision in *Wilkinson*. That case will address the question of "whether an agency determination that a given set of established facts does not rise to the statutory standard of 'exceptional and extremely unusual hardship' is a mixed question of law and fact reviewable under § 1252(a)(2)(D)," which preserves review of "questions of law." Petition for Writ of Certiorari at *i*, *Wilkinson*, No. 20-666 (filed Jan. 17, 2023). Like *Wilkinson*, this case concerns whether a particular agency determination—in this case, clear and convincing evidence of a danger to the community—presents a mixed question of law and fact that a federal court may review under *Guerrero-Lasprilla*. Indeed, the panel's decision below

explicitly relied on Ninth Circuit case law holding that hardship determinations, are discretionary determinations and thus fall outside of judicial review. App. 16.

This Court's determination in *Wilkinson* regarding whether the hardship determination constitutes a mixed question of law and fact will thus bear directly on the Ninth Circuit's analysis regarding the nature and reviewability of the dangerousness determination. Accordingly, once it decides *Wilkinson*, this Could should grant the instant petition, vacate the panel's decision, and remand for further proceedings so that the Ninth Circuit can reconsider the reviewability of the dangerousness determination with the benefit of this Court's analysis of that related question.

Alternatively, should the Court decide not to grant, vacate, and remand in light of its decision in *Wilkinson*, it should grant certiorari to address the second question presented in this case: whether § 1226(e) applies *at all* to this case—an issue not presented in *Wilkinson*. The Ninth Circuit decision held that 8 U.S.C. § 1226(e) applies even though the underlying bond hearing provided to Mr. Martinez was not pursuant to § 1226. Yet subsection (e) is carefully circumscribed. It applies only to Attorney General decisions issued "under this section"—that section is § 1226.

Mr. Martinez's petition did not challenge a discretionary determination applying § 1226 or any bond or parole decision under § 1226. That is because in the prior habeas petition, the district court declared § 1226 (including § 1226(c), the mandatory detention provision governing Mr. Martinez's detention) unconstitutional

as applied to him. The court then ordered a bond hearing to remedy the constitutional violation. The hearing that followed was held pursuant to the Fifth Amendment's Due Process Clause and the district court's authority to issue writs of habeas corpus under 28 U.S.C. § 2241. Thus, in seeking to enforce that order, Mr. Martinez has not sought review of "an action or decision . . . under [§ 1226]" or "regarding the [discretionary] application of [§ 1226]." 8 U.S.C. § 1226(e).

The stakes in this case are significant for Petitioner and thousands of others who are detained while waiting civil agency action. Mr. Martinez is a former lawful permanent resident who has resided in this country since 1987, and he remains detained more than five years after his transfer to immigration custody. The habeas proceedings at issue here took years to complete. Given the lengthy time necessary for the proceedings below to conclude, and given that in most cases a final decision on removability is made long before the question about bond is ready for review by this Court, it is unlikely that this Court will have another opportunity to correct the court of appeals' clear error in construing § 1226(e). Accordingly, the Court should grant the writ even if chooses not to hold this case in abeyance pending *Wilkinson*.

STATEMENT OF THE CASE

I. Legal Framework

Immigration detention pending removal proceedings is governed by 8 U.S.C. § 1226. Section 1226(a) provides the default rule that individuals detained during removal proceedings can be released on bond or conditional parole. Section 1226(c),

by contrast, subjects certain noncitizens to mandatory detention pending completion of removal proceedings. In *Jennings v. Rodriguez*, this Court held that (with certain exceptions not relevant in this case) § 1226(c) mandates the detention of individuals within its scope until the conclusion of removal proceedings. 138 S. Ct. 830, 847 (2018). The result is that a noncitizen detained under § 1226(c) may be incarcerated for years pending the outcome of removal proceedings without any inquiry into whether the person presents a flight risk or danger to the community.

In *Rodriguez*, this Court did not reach the question of whether prolonged detention without an individualized custody hearing may violate due process. 138 S. Ct. at 851; *see also Demore v. Kim*, 538 U.S. 510, 532 (2003) (Kennedy, J., concurring) (observing that pursuant to the Due Process Clause, an individual detained under § 1226(c) "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified").

In this case, the district court held that as a matter of due process, if the Department of Homeland Security (DHS) sought to extend Mr. Martinez's prolonged detention it must prove by clear and convincing evidence that he is either a danger to the community or a flight risk. App. 73.

Section 1226(e) precludes judicial review of "[t]he Attorney General's discretionary judgment regarding the application of [§ 1226]" and states that a court may not "set aside any action or decision by the Attorney General under [§ 1226]"

regarding certain matters.[1] Importantly, § 1226(e) does not bar review of constitutional claims or questions of law. *E.g.*, *Demore*, 538 U.S. at 517 (§ 1226(e) does not bar a constitutional challenge to § 1226(c)'s authorization of detention without bail); *see also, e.g.*, *Rodriguez*, 138 S. Ct. at 841 ("§ 1226(e) does not preclude 'challenges [to] the statutory framework that permits [the noncitizen's] detention without bail'") (quoting *Demore*, 538 U.S. at 517) (first alteration in original).

II. Factual Background

Javier Martinez entered the United States as a conditional resident in September 1987, when he was seven years old, and became a lawful permanent resident three years later. App. 29. Growing up, he was the victim of serious physical and emotional abuse at the hands of his mother, who suffered from an alcohol addiction. *Id.* Neglected by his mother, at about age 13, Mr. Martinez began living with older men who were dealing drugs. *Id.* Mr. Martinez was used as a drug runner, and by the time he was 15 years old, he himself suffered from an addiction to alcohol and cocaine. *Id.*

In October 1999, when he was 19 years old, Mr. Martinez was arrested and charged with conspiracy to distribute cocaine. *Id.* He was convicted and sentenced to 20 months in prison and 5 years of supervised release. *Id.* After he was released from

[1] The Attorney General generally exercises this authority through the Executive Office for Immigration Review, which administers the immigration courts. *See* 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1).

criminal custody in April 2001, DHS commenced removal proceedings against him. *Id*. In September 2002, an IJ granted his application for withholding of removal. *Id*.

From 2002 to 2009, Mr. Martinez lived in Seattle, working to support his daughter as well as his partner and her son. *Id*. Around 2009, however, he relapsed and began using drugs again. *Id*.

In February 2013, Mr. Martinez was arrested and again charged with drug-related crimes. *Id*. He was released on his own recognizance pending trial. App. 29–30. As conditions of release, the court required Mr. Martinez to avoid using or possessing alcohol or any controlled substances, submit to drug and alcohol testing, obtain alcohol/substance abuse and mental health evaluations, and follow any resulting treatment recommendations. App. 30. Mr. Martinez complied with all the conditions of his release, and the district court was "very impressed" with his strong showing of rehabilitation. *Id*. The court sentenced him to 60 months in prison—the mandatory minimum—and allowed him to remain free until the commencement of his sentence. App. 31. Mr. Martinez self-reported to prison in November 2013. *Id*.

While in prison, Mr. Martinez obtained his General Education Development diploma, took additional classes, and attended Bible studies. *Id*. Even though contraband drugs were readily available, he remained sober and sought out counseling to address his drug addiction. *Id*.

On or about April 26, 2018, Mr. Martinez completed his sentence and was turned over to the custody of U.S. Immigration and Customs Enforcement (ICE),

where he has remained ever since. *Id.*; *see also* App. 65. Mr. Martinez is currently being held at the Northwest ICE Processing Center in Tacoma, Washington. *See* App. 28.

ICE is seeking to deport Mr. Martinez based on his 2013 conviction. App. 31. Mr. Martinez is seeking relief under the Convention Against Torture (CAT). *Id*. In March 2019, the IJ denied Mr. Martinez's application for CAT relief, and in August 2019, the BIA dismissed his appeal. App. 31. Mr. Martinez filed an appeal to the Ninth Circuit Court of Appeals, which reversed the Board's decision and remanded for a new decision on August 5, 2022. *Martinez v. Barr*, No. 21-70763 (9th Cir. Aug. 5, 2022). On August 15, 2023, the IJ issued a decision ordering Mr. Martinez to be removed. Mr. Martinez's appeal of that decision is currently pending before the BIA.

III. Procedural History

When ICE took custody of Mr. Martinez in April 2018, it detained Mr. Martinez under 8 U.S.C. § 1226 (c), rendering him ineligible for a bond hearing pursuant to § 1226(a). *See* App. 6, 77. On November 19, 2018, Mr. Martinez filed a petition for writ of habeas corpus before the district court, alleging his prolonged custody violated his constitutional rights. App. 76. On November 13, 2019, after Mr. Martinez had been held in detention for over 18 months, the district court concluded that his prolonged mandatory detention under § 1226(c) violates due process. App. 72–73. To comply with due process, the district court ordered DHS to demonstrate in a custody

hearing before an IJ that Mr. Martinez presents a flight risk or a danger to the community. App. 73.

Pursuant to the district court's order, an IJ conducted a bond hearing on November 26, 2019. App. 65. The IJ denied bond, finding that Mr. Martinez's two prior convictions for drug trafficking established by clear and convincing evidence that he is a danger to the community. App. 69–70. On May 14, 2020, the BIA affirmed the IJ's bond decision. App. 63–64.

Mr. Martinez sought review of the agency's determination in habeas proceedings, arguing that the agency violated the district court's November 13, 2019, order and his continued detention violates the Due Process Clause of the Constitution. App. 34. The district court held that Mr. Martinez presented a colorable due process argument and asserted jurisdiction, App. 35, but affirmed the BIA's decision on the merits, denying his petition for release, App. 40–43.

Mr. Martinez appealed to the Ninth Circuit Court of Appeals. On June 15, 2022, the Ninth Circuit issued its decision, in which it reconsidered the district court's exercise of jurisdiction over Mr. Martinez's claims. App. 10. The Ninth Circuit held the agency's determination that Mr. Martinez is a danger to the community was a "purely discretionary" determination insulated from judicial review under § 1226(e). App. 18.

On September 8, 2022, Mr. Martinez filed a petition for rehearing en banc. The Ninth Circuit denied Mr. Martinez's petition on May 30, 2023. App. 46. Mr. Martinez now seeks review of the Ninth Circuit's decision.

REASONS FOR GRANTING THE WRIT

This case presents two fundamental questions regarding judicial review of immigration detention cases. First, the case asks whether the Ninth Circuit erred in holding that a dangerousness determination precluding release on bond does not present a mixed question of law and fact. Second, the case addresses whether 8 U.S.C. § 1226(e) is applicable to agency determinations made in a bond hearing ordered pursuant to the Fifth Amendment's Due Process Clause. The Ninth Circuit resolved these questions in conflict with existing Supreme Court precedent and other circuit caselaw.

First, in a habeas case such as this one, the petitioner asks a court to apply a "legal standard to undisputed or established facts." *Guerrero-Lasprilla*, 140 S. Ct. at 1068. Specifically, in this case the district court faced the question whether, based on the undisputed and established facts, the government satisfied its burden of demonstrating that Mr. Martinez is a danger to the community.

The Court's answer to the question presented in *Wilkinson v. Garland*, No. 22-666, will shed significant light on that first question presented here. *Wilkinson* and this case each address whether a particular agency determination constitutes a mixed question of law and fact that is reviewable under *Guerrero-Lasprilla*. As a result, this

Court should hold this petition in abeyance until it issues its opinion in *Wilkinson*, and then grant the instant petition, vacate the panel's decision, and remand so that the Ninth Circuit can reconsider the reviewability of the dangerousness determination with the benefit of this Court's analysis of that related question.

Alternatively, should the Court decide not to grant, vacate and remand in light of its decision in *Wilkinson*, it should grant the petition to address the second question presented. The Ninth Circuit fundamentally erred in failing to recognize that the custody determination was not conducted pursuant to § 1226, but instead, pursuant to the district court's order holding that a bond hearing was required under the Fifth Amendment's Due Process Clause. Section 1226(e) insulates from judicial review only certain decisions that "appl[y]" § 1226 or are rendered "under [§ 1226]." By contrast, where a district court finds that the statute is unconstitutional as applied and orders a custody hearing pursuant to the Due Process Clause, any resulting decision from the custody hearing is necessarily not pursuant to the statute. Accordingly, the Ninth Circuit's conclusion that that the bond hearing here implicated § 1226(e) ignored the statute's plain text.

The Ninth Circuit's decision in this case eliminates district court review over the agency's determination purporting to implement the district court's order, effectively insulating any agency determination that fails to lawfully implement such an order. The Court should therefore address this second question presented if it does not grant the petition in light of its decision in *Wilkinson*.

This case is ideal for addressing the questions presented. Mr. Martinez is a former lawful permanent resident detained for many years whose immigration case is likely to last for many more.

I. The Court Should Hold this Case in Abeyance Because it Presents an Issue that is Already Pending Before the Court.

Mr. Martinez presented a mixed question of law and fact to the Ninth Circuit: whether the established facts satisfied the agency's burden of demonstrating that he is a danger to the community, precluding him from being released from detention. However, the panel's decision held that the determination of whether a particular set of facts establishes that a person is a danger to the community is a "'fact-intensive' inquiry"; it is a "subjective question" with no "clear, uniform standard." App. 16–17 (citations omitted). Thus, the court concluded that the determination of whether the undisputed or established facts demonstrate a danger to the community "is a discretionary determination" not subject to review under 8 U.S.C. §1226(e). App. 15.

The panel's decision is inconsistent with *Guerrero-Lasprilla*, where this Court held that reviewable questions of law include mixed questions of law and fact that require the application of established or undisputed facts to a legal standard. 140 S. Ct. at 1068–69. This case involves exactly that: whether, given undisputed facts, Mr. Martinez is a "danger to the community." This issue is similar to past ones where this Court has conducted de novo review to determine whether established facts satisfy the legal standard for detention. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 696–99 (1996) (holding that courts must review de novo issues of

probable cause and reasonable suspicion where the "historical facts are admitted or established") (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)).

The panel in this case took the position that a standard is discretionary and unreviewable if there is "no clear, uniform standard" for how it should be applied. App. 16. But in *Guerrero-Lasprilla* the mixed question involved "due diligence"—a standard that involves an "equitable, often fact-intensive" inquiry, *Holland v. Florida*, 560 U. S. 631, 654 (2010), for which there is no clear, uniform standard. Nonetheless, this Court held that the application of "due diligence" to the undisputed facts of a case is reviewable as a question of law. 140 S. Ct. at 1068; *cf. Ornelas*, 517 U. S. at 698 (even though the mixed question regarding "reasonable suspicion" or "probable cause" involves a "mosaic" of facts and "one determination will seldom be a useful 'precedent' for another," the determination is nevertheless reviewed de novo).

As the eleven dissenters noted in the order denying rehearing en banc, the panel's conclusion conflicts with longstanding precedent addressing the types of determinations that present mixed questions of law, rather than discretionary decisions, and thus are subject to judicial review. App. 47. Under the Ninth Circuit's judgment, the agency could find dangerousness based on a single controlled substance offense committed a dozen years ago, or based on a shoplifting conviction 30 years ago—and there would be no review of the agency's decision applying the dangerousness standard "irrespective of how mistaken that application might be."

Guerrero-Lasprilla, 140 S. Ct. at 1073. Section 1226(e) should not be interpreted to insulate such claims from all Article III review.[2]

Wilkinson, now pending before this Court, will shed significant light on what constitutes a mixed question of law and fact that is reviewable. Specifically, that case will address the question of "whether an agency determination that a given set of established facts does not rise to the statutory standard of 'exceptional and extremely unusual hardship' is a mixed question of law and fact reviewable under § 1252(a)(2)(D)," which preserves review of "questions of law." Petition for Writ of Certiorari at *i*, *Wilkinson*, No. 20-666. Just as in *Wilkinson*, this case turns on whether a particular agency determination constitutes a mixed question of law and fact that a federal court may review.

The Ninth Circuit held that there is no jurisdiction to review the agency's determination because the application of the dangerousness standard (like the hardship standard in *Wilkinson*) involves a "fact-intensive inquiry" that "depends on the identity and the value judgment of the person or entity examining the issue," App. 14 (quoting *Mendez-Castro v. Mukasey*, 552 F.3d 975, 980 (9th Cir. 2009)), with "no clear, uniform standard" governing when that standard is met, App. 16. Indeed, the court based its conclusion that the application of the dangerousness standard is

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[2] "Conditioning release from detention entirely on the identity of the decisionmaker or the decisionmaker's personal tastes or feelings offends the central purpose of the Due Process Clause—protecting individuals from 'arbitrary detention.'" *See* App. 51 (quoting *Rodriguez v. Marin*, 909 F.3d 252, 255, 257 (9th Cir. 2018)).

discretionary and not subject to judicial review in part on the claim that the hardship standard is discretionary and not subject to judicial review. App. 15.

As the *Wilkinson* case raises similar issues directly bearing on the first question presented in this case, Petitioner requests that this case be held in abeyance pending a decision in *Wilkinson*.

II. Subsection 1226(e) Does Not Apply to This Case, and the Ninth Circuit's Holding Otherwise Conflicts with its Own Law and That of Other Circuits.

This case presents a second important question—one that must be resolved regardless of whether the case at hand presents a reviewable question of law: whether 8 U.S.C. § 1226(e) even applies to Mr. Martinez's habeas petition. The statute's clear text demonstrates it does not. By holding to the contrary, the Ninth Circuit ignored the statute's plain language and created a conflict in its own law as well as the law of this Court and other circuits regarding the powers of habeas courts.

A. The Ninth Circuit Ignored § 1226(e)'s Plain Text, Upending Federal Courts' Power to Enforce Their Own Orders Granting a Writ of Habeas Corpus.

Section 1226(e) limits district court review only in cases involving a "discretionary judgment regarding the application of [8 U.S.C. § 1226]," and only in bond and parole decisions reached "under [§ 1226]." 8 U.S.C. § 1226(e). Mr. Martinez's bond hearing did not occur pursuant to § 1226. When DHS first detained Mr. Martinez, he did not receive a bond hearing because the IJ "determined that he did not have jurisdiction to release Martinez because he was subject to mandatory

detention under 8 U.S.C. § 1226(c)." App. 8. The IJ's conclusion followed this Court's decision in *Rodriguez*, which held that "§ 1226(c) mandates detention" without exception and without any opportunity for a hearing. 138 S. Ct. at 847.

Mr. Martinez filed a petition for writ of habeas corpus arguing that, because his detention without bond had become unreasonably prolonged, § 1226 could no longer be applied to him as it violated his constitutional right to due process under the Fifth Amendment. The district court granted his "as applied" challenge to § 1226, concluding that Mr. Martinez's "continued mandatory detention under § 1226(c) has become unreasonable and in violation of due process." App. 97. The court then required a bond hearing with specific procedural protections, including a requirement that the government bear the burden of proof. *Id.* By doing so, the district court afforded the "typical relief granted in federal habeas corpus" cases. *Herrera v. Collins*, 506 U.S. 390, 403 (1993). Namely, the court issued a "conditional order of release," *id.*, that provides the detaining authority "an opportunity to correct the constitutional violation found by the court," *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

Underlying that judgment was the conclusion that § 1226(c) violates the Due Process Clause as to Mr. Martinez; it is, in other words "repugnant to the constitution" and "void," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), in this "particular application of the law," *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989) (explaining the Court's preference for as-applied constitutional

challenges to a statute). Accordingly, the bond hearing that Mr. Martinez received in November 2019 was required by and held pursuant to the Due Process Clause.

Mr. Martinez's bond hearing thus did not implicate a "discretionary judgment regarding the application of *this section*"—i.e., Section 1226. 8 U.S.C. § 1226(e) (emphasis added). In fact, no "application of this section" was possible, as "§ 1226(c) mandates detention," *Rodriguez*, 138 S. Ct. at 847, and prohibits bond hearings like the one ordered by the court for Mr. Martinez. For similar reasons, there was not an "action or decision by the Attorney General under this section," 8 U.S.C. § 1226(e), as it was the Due Process Clause that provided the legal basis for the order granting a conditional writ of habeas.

This Court's decision in *Rodriguez* underscores the inapplicability of § 1226(e). *Rodriguez* explained that "[b]ecause the extent of the Government's detention authority is not a matter of 'discretionary judgment,' 'action,' or 'decision,' respondents' challenge to 'the statutory framework that permits [their] detention without bail,' falls outside of the scope of § 1226(e)." 138 S. Ct. at 841 (quoting *Demore*, 538 U.S. at 517). Thus, *Rodriguez* affirmed that § 1226(e) does not apply to custody determinations required not by statute under § 1226, but by the Due Process Clause.

The statute's text—which the Ninth Circuit did not meaningfully analyze—reinforces this conclusion. The limitation on review of "discretionary judgments" encompasses only judgments that "app[ly] . . . this section." 8 U.S.C. § 1226(e). And the restriction on setting aside detention, bond, or parole decisions applies only to

such decisions issued "under this section." *Id.* "[T]his section" unambiguously refers to § 1226. *Id.* Such "plain terms," *Lora v. United States*, 599 U.S. 453, 458 (2023) (construing the language "under this subsection"), mean that only a discretionary decision "apply[ing] [§ 1226]" or "under [§ 1226]" is subject to subsection (e)'s restrictions, *see, e.g.*, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 300 (2017) (explaining how Congress uses the language "under this section" to "make precise cross-references"). "Congress often drafts statutes with hierarchical schemes—section, subsection, paragraph, and on down the line," and when it does so, it knows how to "refer only to a particular subsection or paragraph." *SW Gen., Inc.*, 580 U.S. at 300. The same holds true here: "[b]y those plain terms ['under this section'], Congress applied the [jurisdictional limitation] only to [the specified actions] under *that* []section." *Lora*, 599 U.S. at 458; *see also West v. Gibson*, 527 U.S. 212, 221 (1999) (explaining that "there is no reason to believe Congress intended more" where statute applied only "under this section"). Thus, because the bond hearing was granted pursuant to the Fifth Amendment, not pursuant to § 1226, subsection (e) does not apply.

B. The Ninth Circuit Decision Creates Conflict with Decisions of this Court and Other Circuits regarding Conditional Writs of Habeas Corpus.

The Ninth Circuit's decision is also in tension with this Court and other circuits' decisions recognizing the habeas courts' authority to enforce a conditional writ of habeas corpus. The district court in this case afforded a common remedy in

immigration detention cases: a bond hearing within a certain time frame and with specific protections, or release if the government does not comply. Such conditional writs are "often 'appropriate' to allow the executive to cure defects in a detention." *DHS v. Thuraissigiam*, 591 U.S. ---, 140 S. Ct. 1959, 1981 (2020) (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)). But if the detaining authority does not take the "opportunity to correct the constitutional violation," *Hilton*, 481 U.S. at 775, then the remedy is "always release," *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring). Indeed, this is precisely what this Court has instructed lower courts when issuing such a writ. In cases where a lower court failed to provide appropriate habeas relief, this Court has remanded "with instructions to enter such orders as may be appropriate to allow [the detaining authority] a reasonable time within which to take further proceedings not inconsistent with this opinion, failing which the petitioner shall be discharged." *Chessman v. Teets*, 354 U.S. 156, 166 (1957); *see also, e.g.*, *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 210 (1951) (remanding with instructions for the district court to "enter such orders as are appropriate to allow the State a reasonable time in which to afford respondent the full appellate review he would have received but for the suppression of his papers, failing which he shall be discharged").

Conditional writs of habeas corpus thus necessarily assume that the court has jurisdiction to enforce its prior order by ordering release. Otherwise the writ would become toothless, and a district court powerless to enforce its own order. Numerous

circuits—and even other panels of the Ninth Circuit—recognize that this power is foundational to the exercise of habeas jurisdiction. *See, e.g.*, *Rose v. Guyer*, 961 F.3d 1238, 1246 (9th Cir. 2020) ("Upon the filing of a . . . motion to enforce a conditional writ, a district court must decide whether a [detaining authority] has complied with the remedy designed by the district court in the underlying habeas proceedings."); *Leonardo v. Crawford*, 646 F.3d 1157, 1161 (9th Cir. 2011) ("[D]istrict court[s] ha[ve] authority to review compliance with [their] earlier order[s] conditionally granting habeas relief."); *Gibbs v. Frank*, 500 F.3d 202, 208 (3d Cir. 2007) (evaluating whether state had complied with conditional writ of habeas corpus, and noting that the court had the power to do so); *Satterlee v. Wolfenbarger*, 453 F.3d 362, 369 (6th Cir. 2006) (same); *Phifer v. Warden*, 53 F.3d 859, 864–65 (7th Cir. 1995) (same); *Grasso v. Norton*, 520 F.2d 27, 38 (2d Cir. 1975) (upholding district court decision ordering release after parole board failed to comply with conditional grant of writ of habeas corpus). And it is critical that courts *do* exercise this power, as after all, a conditional writ of habeas corpus is simply an "accommodation[]" to the custodian that forestalls immediate release while the custodian expeditiously remedies the constitutional infirmity. *Phifer*, 53 F.3d at 864–65. Without this power, custodians could simply ignore "constitutional violation[s]" and continue to unlawfully hold detained persons. *Hilton*, 481 U.S. at 775.

The Ninth Circuit's decision ignored the structure of conditional writs of habeas corpus, placing it at odds with caselaw from this Court and other circuit

decisions. Accordingly, this Court should grant certiorari to address the second question presented.

CONCLUSION

The Court should hold this case in abeyance pending the outcome in *Wilkinson*. If the Court decides not to grant the petition in light of its decision in *Wilkinson*, then it should grant the petition to address the second question presented here.

Respectfully submitted this 26th of September, 2023,

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